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IN THE

Supreme Court of the United States

October Term, A.D., 1956

No. ...813...

HARVEY MILNER, *Et Al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Defendant.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AFFIRMED IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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TABLE OF CONTENTS

PAGE

PETITION

A. Summary Statement of the Matter Involved 1
Indictment 2

B. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT 6

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 7

I. The opinions of the Courts below 7

II. Jurisdiction 7

III. Statement of the Case 8

IV. Specification of Errors 8

V. ARGUMENT 10

Summary of the argument 10

Point A. The Federal Courts have no jurisdiction 10

Point B. The Trial Court erred in holding that the devices came within the charge made in Count I 12

Point C. Petitioners were not shown to be dealers 16

Point D. The Johnson Act as here construed is unconstitutional 18

Point E. The Johnson Act is unconstitutionally vague 21

First Appendix. Statute Involved 22

Second Appendix. Opinion of Court of Appeals 26

TABLE OF CASES

United States v. Braun, 119 F. Supp. 646 11

United States v. Denmark, 119 F. Supp. 647 11

United States v. 15 Mills Blue Bell Gambling Machine, 119 F. Supp. 74 11

United States v. Five Gambling Devices, 346 U.S. 441 ..... 11, 13, 21

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A.D., 1956

No. .....

HARVEY MILNER, Et Al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Defendant.

PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Harvey Milner, John Moore, Joseph Aiuppa and Ray Johnson shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was an indictment consisting of four counts brought under the Johnson Act. Taylor & Company, a partnership, it was said, caused to be shipped in interstate commerce a certain device, held by the Trial Court to be a gambling device, prohibited as a subassembly of a slot machine. The Trial Court, before trial dismissed Count II, *United States v. Ansani*, 138 F. Supp. 451* and at the end acquitted all

*It will be noted that Judge Campbell the Trial Judge wrote two opinions, one, United States v. Ansani, 138 F. Supp. 451, in passing on the sufficiency of the indictment, and two, United States v. Ansani, 138 F. Supp. 454 upon the entry of judgment.

of the defendants as charged in Count IV. All were convicted under Count III. Robert Ansani alone was convicted under Count I. Each defendant was sentenced to a year and a day in the penitentiary and to pay a fine of $1,000. Ansani does not join in this petition having served his time and paid his fine. Petitioners are on bail and have obtained a stay of mandate.

The Indictment.

5 R. 3

Count I.

The defendants (naming them), co-partners doing business as Taylor & Company, on, to wit, the 26th day of February 1954, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, did unlawfully, knowingly, and willfully ship and cause to be transported in interstate commerce a number of gambling devices, that is to say, a subassembly and essential part intended to be used in connection with so-called slot machines, to wit:

Four (4) mechanical devices,

which said mechanical devices bore serial numbers B114, B211, B223 and B303, respectively, the sole use and purpose of which was in connection with so-called slot machines, and which said mechanical devices are known by the name and style of Trade Boosters, from, to wit, Chicago, Illinois, to, to wit, Frank J. Zaydell, Williamsport, Pennsylvania, * * * in violation of Section 1172, Title 15, United States Code.*

* Ansani alone was convicted under this count and petitioners were acquitted. Count I remains as material to this petition for the reason that Judge Campbell predicated his conviction of petitioners under Count III for failure to register upon the acts of Ansani in violation of Count I.

Count III.

7 R. 5

That on, to wit, July 1, 1954, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, the defendants, (naming them) co-partners doing business as a partnership under the name and style of Taylor & Company, as dealers in gambling devices, that is to say, a subassembly and essential part intended to be used in connection with so-called slot machines, wilifully, knowingly and unlawfully failed and refused to register with the Attorney General of the United States or the United States Atorney for the Northern District of Illinois, as such dealers in gambling devices, their names or trade names and the addresses of their principal places of business in the Northern District of Illinois; in violation of Section 1173, Title 15, United States Code.

Counts II and IV, now out of the case, are shown in the printed transcript R. 4, 5.

The Trial Judge, at the conclusion of the trial without a jury, read a memorandum printed here in full, R. 129. Reported in *United States* v. *Ansani*, 138 F. Supp. 454. This opinion of Judge Campbell is quite full and detailed and will, we believe, at the outset give Your Honors an understanding of the issues, some of which were decided in favor of these defendants. Our main contention involves a different construction of the Johnson Act than made by Judge Campbell. We respectfully submit that a proper construction of the Johnson Act will cause Your Honors to conclude that the Government had no case. If the Johnson Act be construed as in the case at bar it is unconstitutional.

Taylor & Company maintains a place of business in Cicero, Illinois. It sells playing cards, dice and such equipment. Frank Zaydell, R. 82, testified that in Williamsport, Pennsylvania, he was in the business of handling amusement machines. On February 25, 1954 Taylor and Company shipped to him certain Trade Booster Units. The inventory was put into evidence R. 87. It appears that these devices were taken by the Government, along with the slot machine, in a libel proceeding. The electrical device and the slot machine were produced in the Trial Court for demonstration. John F. Glenville, R. 21, a special agent of the Federal Bureau of Investigation, called at the factory and office of Taylor & Company and interviewed the defendant Ansani. Ansani displayed this device, called a Trade Booster, hooked up to a slot machine. Ansani explained to the agent how it worked.

Count I, R. 3 has been left in the case only as to Ansani. Count I charges Ansani with shipping the device from Chicago to Williamsport. Count I charges that this gadget was a gambling device, a subassembly and essential part intended to be used with slot machines.

Our contention about the Johnson Act is that its legislative history and its wording shows its purpose. The section about the subassembly was included to prohibit evasion by sending a slot machine in separate packages. Here in the case at bar no slot machine was sent, so we submit that Judge Campbell in the Trial Court and Judge Swaim in the Court of Appeals should never have bothered with the use which was in fact made of the electrical device. It is our contention that there is no law prohibiting the shipment of this gadget. The proof has failed.

The United States Court of Appeals concluded that the trade boosters in question were subassemblies or essential parts intended to be used in connection with so called slot machines or mechanical devices. No slot machine was transported and it is our respectful contention that such

construction is unsound and in conflict with the decisions of this Honorable Court.

It will be noted that Count III charges these petitioners with failure to register and that they were dealers in this subassembly and essential part intended to be used in connection with slot machines. It is contended that the electronic device is not a gambling device. The Government rested its entire case as to interstate shipment on the delivery, by way of express, by Ansani to Zaydell. Judge Campbell discharged petitioners from liability as to the acts of Ansani concerning the shipping. Yet Judge Campbell held that petitioners were dealers in interstate commerce because of the acts of Ansani. Petitioners were found guilty of failure to register. There being no evidence that petitioners were dealers, the Johnson Act as construed below obliged defendants to incriminate themselves and accept responsibility for the acts of Ansani in a case where the Government was unable to prove such responsibiilty. Such responsibility did not exist according to Judge Campbell. So these defendants were required to confess a criminal act not committed by them. Such construction of the Johnson Act renders it unconstitutional.

It was also claimed below that the Johnson Act is unconstitutional because it is vague as to where a dealer must register. Judge Swaim answered this point by apparently following a dissent in *United States* v. *Gambling Devices*, 346 U.S. 441.

Conclusion.

To sum this case up now as presented by petitioners, petitioners were in partnership with Ansani, the Trial Judge correctly held that petitioners were not responsible for crimes committed by Ansani without further proof. Yet the Trial Judge proceeded to declare that petitioners were dealers because of the crime committed by Ansani, assuming that Ansani did commit a crime. Of course if Ansani committed no crime the case fails at the threshold.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Court of Appeals has decided important questions of federal law which have not been but should be settled by this Honorable Court and in a way probably in conflict with applicable decisions of this Honorable Court.

2. The Johnson Act as construed and applied here is unconstitutional.

3. The constitutional questions as previously presented did not require decision by this Honorable Court. Here they are squarely presented.

4. A division of opinion resulted among the Justices on a point not necessary for decision in a previous case. Here the Court of Appeals has followed the reasoning of the minority and the question is squarely presented.

5. There is a conflict of decisions in the lower courts as to what constitutes a gambling device and the proper construction of the Johnson Act.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued directed to the United States Court of Appeals for the Seventh Circuit and that said judgments may be reversed.

HARVEY MILNER,
JOHN MOORE,
JOSEPH AIUPPA, and
RAY JOHNSON,
Petitioners

By WM. SCOTT STEWART,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the District Court is reported *United States* v. *Ansani*, 138 F. Supp. 454. The opinion of the Court of Appeals rendered on January 15, 1957, shown in the record is not yet reported. A copy is appended.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is January 15, 1957. Petition for rehearing was denied February 1, 1957.

2. The trial court and the Appeals Court committed error in the manner in which the Johnson Act was construed to include the electronic gadget which was not part of a slot machine.

3. The slot machine was never in interstate commerce as far as this record discloses and the Federal Courts had no jurisdiction.

4. Petitioners were not shown to be dealers. The indictment limited the charge of dealership to the electronic gadget. Ansani did the shipping and the Trial Court held that petitioners were not responsible. Yet the Trial Court and the Court of Appeals held petitioners responsible as dealers, based upon the acts of Ansani.

5. The obligation of petitioners to register as dealers required them to incriminate themselves for something they did not do. Such application of the Johnson Act renders it unconstitutional.

6. The Johnson Act is vague and therefore unconstitutional.

7. A conflict exists in the various courts below as to a proper construction of the Johnson Act and the members of this Court have expressed a division of opinion. The case at bar makes a decision of these questions necessary and they should be settled.

8. Jurisdiction is invoked by Judicial Code § 240.

III.

Statement of the Case.

A full statement of the case has been given under heading A in the petition.

IV.

Specification of Errors.

1. The Trial Court erred and the Court of Appeals committed like error in its construction of the Johnson Act to include the electronic gadget here involved.

2. The Federal Courts have no jurisdiction because the slot machine was never in interstate commerce as far as this record discloses.

3. Petitioners were not shown to be dealers as defined by the Johnson Act.

4. After the Trial Court correctly held that petitioners were not responsible for the criminal acts of a partner, the Trial Court proceeded to hold petitioners responsible for such crimes in order to declare petitioners to be dealers.

5. After the Trial Court held that the Johnson Act was unconstitutional in requiring an inventory it should have

followed that the requirement to register was unconstitutional for the same reasons.

6. The Johnson Act is unconstitutional as construed below. Petitioners were required to confess something criminal not done by them.

7. The Johnson Act is unconstitutional because it is vague.

V.

ARGUMENT.

Summary of the Argument.

1. The Courts below have construed the Johnson Act in such way to put the Federal Government into the entire pursuit of articles capable of being used for gambling and in such way as to require a holding here that the Act is unconstitutional, if the interpretation is to be accepted.

2. The slot machine was never in interstate commerce. Federal Courts have no jurisdiction.

3. Petitioners were not shown to be dealers as defined by the Johnson Act. After the Trial Judge correctly held that petitioners were not liable for the crimes (if any) of Ansani, the Trial Judge made use of the crimes of Ansani to declare that petitioners were dealers.

4. As construed below the Johnson Act required petitioners to register and confess criminal acts not performed by them.

5. After the Trial Judge held the Johnson Act to be unconstitutional as to inventory the same reasoning required a like finding as to registration.

6. The Johnson Act is unconstitutional because it is vague as to the place one is required to register.

7. We set out the Statute and use headnotes from the reported decision of the trial court to show that the statute was not properly construed.

Argument.

POINT A.

The Federal Courts have no jurisdiction.

It must be remembered that the slot machine was not at any time transported nor did it in any way affect inter-

state commerce. Mr. Justice Jackson in *United States* v. *Gambling Devices*, 346 U.S. 441, 449, said:

> "Our policy in constitutional cases is reinforced by the long tradition and sound reasons which admonish against enlargement of criminal statutes by interpretation."

In the case at bar, if the interpretation given below is correct Congress has exceeded its power. If the trial Judge and Judge Swaim are correct it is unlawful for a merchant to ship a storage battery, an electric cord or bulb to the owner of a slot machine. The shipment is made criminal by the use made of the article. The case at bar presents a successful attempt to enforce the view of the Department of Justice. This case, if sustained would take unto the Federal Government the entire pursuit of the gambling device. All Your Honors need decide at present is a question of statutory construction. If the courts below are correct the Johnson Act is unconstitutional. If the gadget does not come within the Act these judgments should be reversed. The Congressmen never heard of a Trade Booster and made no attempt to describe it as a device with a drum or a reel. All we need here is an understanding of the plain words of the Act. We have appended the opinion of Judge Swaim and have made much of our argument there in footnotes.

Concerning our proposition that the trial court erred in holding that the devices did not come within the charge we cite the following merely as informative:

United States v. Five Gambling Devices, 346 U.S. 441, 98 L. Ed. 123;

United States v. Denmark, 119 F. Supp. 647;

United States v. 15 Mills Blue Bell Gambling Machine, 119 F. Supp. 74;

United States v. *Braun*, 119 F. Supp. 646.

POINT B.

The Trial Court erred in holding that the devices came within the charge made in Count I.

We respectfully submit that the Court of Appeals made the same error. Although these petitioners were acquitted under Count I the shipment was used as a basis for the conviction under Count III. So we complain of the construction given the Johnson Act as to Count I. We have copied the Johnson Act in full here in an appendix.

We have set out the statute in full in the appendix in order that Your Honors might see that (3) should be construed with the two preceding paragraphs. The whole act should be taken as legislation against the shipment of slot machines. The purpose of Congress, as we see it, was not to prohibit gambling devices in general. No slot machine was shipped in the case at bar. The fact that the gadget could be used on a slot machine and was so intended, is not enough. The gadget must have been a part of the slot machine to start with, in the original design. The fact that Congress provided for labels and numbers helps to show that (3) was intended to prevent evasion by dividing up the original shipment. Judge Learned Hand collected a number of decisions of this Honorable Court on statutory construction in *Cabell* v. *Markham*, 148 F. 2nd 737, 739 and said,

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing; be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

With this in mind we respectfully request Your Honors to again read all of the opinions in *United States* v. *Gambling Devices,* 346 U.S. 441. The purpose and object of the Johnson Act is there made clear and should not be extended by Judicial interpretation. Mr. Justice Clark dissenting spoke of slot machines and noted, p. 463, that the commodity involved made the situation unique. The controversy was over slot machines. No slot machine in interstate commerce, no federal jurisdiction.

In consideration of the opinion below by Judge Swaim we respectfully request that Your Honors keep in mind that said by Mr. Justice Jackson in *United States* v. *Gambling Devices,* 346, U. S. 441, 449

> "We do not question that the literal language of this Act is capable of the broad, unlimited construction urged by the Government. Indeed, if it were enacted for a unitary system of government no other construction would be appropriate. But we must assume that the implications and limitations of our federal system constitute a major premise in all congressional legislation, though not repeatedly recited therein."

This whole case falls, when Your Honors regard this Johnson Act as expressed and intended by Congress. Here no slot machine was shipped. It is beside the point to hold, as did Judge Campbell, that the gadget could be used with a slot machine. Congress knew nothing of the Trade Booster. We respectfully submit that Section (3) regarding an assembly is intended to prevent shipment of a slot machine broken down into parts.

We believe we might make our point here by reference to the headnotes in *United States* v. *Ansani,* 138 F. Supp. 454. We go back to the carefully considered opinion of Judge Campbell. Judge Swaim apparently has adopted its reasoning and has added thereto. In other words an under-

standing of the case here, we believe, requires first careful consideration of the opinion of the Trial Judge.

1. Gaming

A "slot machine," within statute prohibiting interstate transportation of slot machines, means a device which employs drums or reels with familiar insignia thereon which, when activated either mechanically or electrically after payment of required consideration, might entitle a person, by application of an element of chance, to winnings payable in money or property, and existence of a "slot" is not essential. 15 U.S.C.S. § 1171 (a).

We accept this definition for the purpose of argument. We again assert that no slot machine had been transported in this case. For the purpose of argument, we might admit that the Pennsylvania tavern keeper or dealer had a slot machine. It was altered. After alteration it was still a slot machine. But in the case at bar there was no evidence that the slot machine had been in interstate commerce. So how it worked before or after alteration was no business of the Government. We realize of course that this statement concerning a slot machine in the above head note was made by Judge Campbell as preliminary. No doubt the Trial Judge was aware of the fact that Taylor and Company had not shipped a slot machine. Judge Campbell, in our humble opinion, did not give sufficient heed to the fact that no slot machine was transported. Judge Swaim inadvertently assumed that our defense in the Court of Appeals was based upon this claim that the altered device, as it sat in Pennsylvania, was not a slot machine. That defense was made and lost in the trial court. It is now of no importance. As we have said, for the purpose of this petition in order to not argue immaterial matters we accept the reasoning of Judge Campbell. Now we progress to the next heading.

2. Gaming

That devices which defendants shipped for use with slot machines involved the removal of the slots and coin dispensers on the machines did not, deprive the altered machines of their character, as "slot machines", within statute prohibiting interstate shipment of slot machines or their component parts. 15 U.S.C.A. § 1171 (a).

If we accept this as true, Judge Campbell has left out of consideration that the slot machines were in Pennsylvania and it was no business of the Government how they operated or had been altered in that State.

The crux of this case is outlined in the following headnote:

3. Gaming

Device which was designed to replace, by remote control electrical operation, the coin receiving and dispensing portions of slot machines was within definition of "subassembly or essential part" of a gambling device, within the statute prohibiting interstate transportation of such. 15 U.S.C.A. § 1171(a).

Our dispute here with Judge Campbell, with all due respect, involves a look by this Honorable Court at the Johnson Act. We submit that the device was not within the definition. Judge Campbell has inadvertently left out of consideration that the Johnson Act was intended to prevent the shipment of slot machines. The Congressmen knew nothing of this electrical device. They intended to prevent evasion by shipment of parts in separate packages. The design to replace, by this gadget, was conceived after the slot machines were in Pennsylvania. The gadget was not prohibited by the statute, nor was it anticipated. We submit

that Judge Swaim fell into this same error as we endeavor to point out in an appendix. Your Honors will note that petitioners asked Judge Campbell to limit (3) to the machines described in (2). Judge Campbell held that (3) referred to (1) the slot machine as well as (2) other machines. Judge Swaim has enlarged the statute further by holding that (3) includes assemblies which may be regarded as gambling devices regardless of (1) or (2). We copy the following:

> 5. Gaming
>
> In prosecution for interstate shipment of gambling devices, evidence established that defendant's device, which was adaptable as substitute for coin receiving and dispensing elements of a slot machine, was devised, designed, manufactured and sold to be used in connection with slot machine. 15 U.S.C.A. § 1171(a).

Here Judge Campbell has left out of consideration entirely that the slot machine was at rest and had not been shipped by Taylor & Company. The Johnson Act does not prohibit a gadget sold to be used in connection with a slot machine. As we understand it, the Johnson Act prohibited the shipment of such machines. Here we have no shipment of a slot machine. What someone may have subsequently designed to replace parts not included in the original design was not thought of by Congress. The Johnson Act does not apply to this gadget. Judge Swaim, we respectfully submit, made this same error.

POINT C.

Petitioners were not shown to be dealers.

Your Honors will note first that Count III charges these petitioners with being dealers because of a subassembly. If Ansani had not put these gadgets in interstate com-

merce the Federal Government would have no legitimate concern. Judge Campbell said, p. 461

> "The defendants next contend that the Government has failed to prove that these defendants are dealers in gambling devices. They argue that one transaction does not establish one as a dealer. * * * The potential to make sales in a given community, rather than actual sales themselves makes one a dealer in that commodity."

We respectfully submit that Judge Campbell failed to keep in mind that a dealer as to a local commodity was not necessarily a dealer in interstate commerce. Judge Campbell said, p. 461

> "Agent Glenville's testimony reveals that Taylor & Company's place of business was such to indicate that it was equipped to distribute gambling devices. The proof is complete with the evidence that the several named defendants were partners in Taylor & Company during the time in question."

Suppose we accept for the purpose of this argument that petitioners were partners, yet Judge Campbell here inadvertently failed to apply the real test which Judge Campbell correctly applied to the evidence under Count I. We quote, p. 460

> "In the instant case there is no evidence that the defendants Milner, Johnson and Moore knew of Ansani's illegal interstate shipment of gambling devices. Nor is it shown that these defendants were accessories before or after the crime. * * * It may be well that Ansani took on the interstate aspect of dealership on his own or it may be that the others knew of and condoned Ansani's action. However, it is incumbent upon the Government to prove beyond a reasonable doubt that these four defendants are guilty as charged. This, the Government failed to do."

Yet Judge Campbell first and Judge Swaim second, found petitioners guilty because of that done by Ansani. Judge Swaim said,

> "Since the defendants were, in fact, interstate dealers in gambling devices their constitutional rights have not been violated * * *."

Judge Swaim forgot that Ansani was the only dealer in interstate commerce, but this is not merely a question of insufficiency of evidence. We complain of the manner in which the Johnson Act was applied to deprive petitioners of the privilege of the Fifth Amendment.

POINT D.

The Johnson Act as here construed is unconstitutional.

Judge Swaim said,

> "Since the privilege against self incrimination relates only to past acts, the privilege has no just application to the situation before us. *United States* v. *Kahriger*, 345 U.S. 22, 32; *Lewis* v. *United States*, 348 U.S. 419, 422" *

We quote from *Lewis* v. *United States*, 348 U.S. 419, 422:

> "If petitioner desires to engage in an unlawful business, he does so only at his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures by the act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. * * * The only comparison under the Act is that requiring which would-be gamblers must make at the threshold. They may have to give up gambling, but

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* The Kahriger, Lewis and Sullivan cases cited by Judge Swaim are tax cases. In *United States* v. *Gambling Devices*, 346 U.S. 441, 448, Mr. Justice Jackson said

> "Of course decisions upholding legislation requiring information in aid of the taxing power afford no support here, because the taxing power penetrates and permeates every activity intrastate or interstate, within the Nation."

there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax."

Suppose we adopt this reasoning and apply it to Ansani. He made a decision at the threshold and elected to ship in interstate commerce and become a dealer required to register. But permit us to examine the opinions below in the light of this reasoning. The Johnson Act has said to petitioners you may or may not know that your partner Ansani has decided to become a dealer, however it is your duty to declare yourself a dealer if by his acts he has made himself subject to registration. In other words you are compelled to be a witness against yourself on a matter in which you had no election and in a case where you may be innocent. Or if you are guilty because you adopted Ansani's act and the Government is otherwise unable to prove your adoption, now must come forward and furnish the evidence against yourself. The Johnson Act makes no provision for what you might do in case you discovered the election made by Ansani and desired to reject his decision as far as you are concerned. The Johnson Act, as construed here, gave Ansani unlimited power to make you a criminal and there is nothing you can do about it. You must now go to the penitentiary for his acts.

We again quote from Judge Swaim:

> "Furthermore, since defendants failed to register, the question arises whether they can claim the privilege even assuming that the disclosure of criminal acts is required. See *United States* v. *Sullivan*, 274 U.S. 259, 263, 264."

We quote from Mr. Justice Holmes in the *Sullivan case*, p. 263

> "If the form of return provided called for answers that the defendant was privileged from making he

> could have raised the objection in the return, but could not on that account refuse to make any return at all."

We submit that the *Sullivan case* is easily distinguishable from the one at bar. Petitioners were required to register as dealers or refuse to do so. The Johnson Act gives them no way of registering and at the same time claiming privilege. The only way to test the law is to refuse or fail to register.

Judge Campbell in dismissing Count II said in *United States* v. *Ansani*, 138 F. Supp. 451, 454

> "The problem here, as I see it, is as simple as it would be if all burglars, for example were required to file monthly reports of burglaries perpetrated during the preceding month, together with an inventory of all stolen goods. Such a requirement would certainly simplify the apprehension and prosecution of burglars; but it would be repugnant to the Fifth Amendment to our Constitution of the United States."

Judge Swaim noted that the Government has not appealed this determination, so we respectfully submit that the ruling of the Trial Judge has become the law of the case. Once it is established as a matter of law that petitioners are not required to file reports because the Johnson Act is unconstitutional because of this requirement it follows as night follows day that the requirement that petitioners register is also unconstitutional. To make further use of the illustration employed by Judge Campbell concerning burglars Judge Campbell has declared that the burglars need not tell what they stole but nevertheless they must designate themselves as burglars. Further if a partner chooses to turn burglar they must also so turn and register as such.

Now if Your Honors will again examine the reasoning employed by Judge Campbell in finding petitioners not guilty as to Counts I and IV, Your Honors will perceive

the importance of the privilege granted by the Fifth Amendment. If petitioners had registered as dealers, the missing link would have been supplied and they would have been found guilty of the crime of shipment and failure to properly label. The Government was in possession of all necessary evidence except that which would have been supplied by registration.

POINT E.

The Johnson Act is unconstitutionally vague.

This is the same point made by Appellees in *United States* v. *Gambling Devices*, 346 U.S. 441, 444. Mr. Justice Jackson said,

> "We do not intimate any answer to appellees' constitutional questions other than observe that they cannot be dismissed as frivilous, nor as unimportant to the nature of our federation.

Mr. Justice Black concurring said, p. 453

> "Nor can a criminal statute too vague to be constitutional be saved by additions made to it by the Attorney General."

In the case at bar Judge Swaim appears to have followed the dissent written by Mr. Justice Clark, p. 454.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers.

Respectfully submitted,

WM. SCOTT STEWART,
Attorney for Petitioners.

FIRST APPENDIX.

Statute Involved.

[PUBLIC LAW 906—81ST CONGRESS]
[CHAPTER 1194—2D SESSION]

[S. 3357]
AN ACT

To prohibit transportation of gambling devices in interstate and foreign commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That as used in this Act—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

(b) The term "State" includes Alaska, Hawaii, Puerto Rico, the Virgin Islands, and Guam.

(c) The term "possession of the United States" means any possession of the United States which is not named in paragraph (b) of this section.

SEC. 2. It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

Nothing in this Act shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act, as amended (15 U.S.C. 41-58).

SEC. 3. Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the

buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this Act, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

SEC. 4. All gambling devices, and all packages containing any such, when shipped or transported shall be plainly and clearly labeled or marked so that the name and address of the shipper and of the consignee, and the nature of the article or the contents of the package may be readily ascertained on an inspection of the outside of the article or package.

SEC. 5. It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 of the United States Code or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18 of the United States Code.

SEC. 6. Whoever violates any of the provisions of sections 2, 3, 4, or 5 of this Act shall be fined not more than $5,000 or imprisoned not more than two years, or both.

SEC. 7. Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this Act shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof: *Provided*, That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this Act by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

SEC. 8. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Approved January 2, 1951.

SECOND APPENDIX.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 11729 SEPTEMBER TERM 1956, JANUARY SESSION 1957.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT J. ANSANI, HARVEY MILNER, JOHN EDWARD MOORE, JOSEPH J. AIUPPA and RAY JOHNSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 15, 1957

Before MAJOR, SWAIM and SCHNACKENBERG, *Circuit Judges.*[1]

Footnote [1]

Counsel for petitioner has added foot notes and made use of bold face type, in order to include this opinion in his argument.

SWAIM, *Circuit Judge.* The defendants were convicted, under one count, of failing and refusing to register as dealers in gambling devices in violation of Section 1173, Title 15 U.S.C.A.; and, under another count, the defendant Ansani was also convicted of shipping and causing to be transported in interstate commerce certain gambling devices in violation of Section 1172, Title 15 U.S.C.A. Each of the defendants was sentenced to imprisonment for one year and one day and fined $1,000.00. The decision of the District Court is reported in *United States v. Ansani,* N. D. Ill., 138 F. Supp. 454.

Numerous points are raised by defendants, the most substantial of which is whether the devices in question,

i.e., certain "trade boosters," are gambling devices as defined in 15 U.S.C.A. §1171(a)(3).[2]

Footnote [2]

> We submit that it causes confusion at the start to put our question thus. It is not a question of whether the Trade Booster is a gambling device. The question is how to construe §1171(3).

The trade booster is an electrically operated device. It consists of a steel cabinet containing various electrical circuits and two control units.[3] Functionally the device

Footnote [3]

> The electric gadget is described in the record and by Judge Campbell the Trial Judge. Judge Campbell refused to accept the conclusion made by Judge Kennedy in *United States* v. *McManus*, 138 F. Supp. 164 and preferred *United States* v. *Three Trade Boosters*, 135 F. Supp. 164. To follow this difference among trial judges would get us away from our real point.

is useless unless employed in conjunction with another appliance, which in the instant case was a slot machine. The slot machines on which trade boosters were used were altered or modified by removing the slots into which coins were inserted to activate the machines and the slots from which money was discharged from the machines. In this denuded condition the slot machine was mechanically inoperable. After these mechanical modifications, the trade booster and the slot machine were connected and the various electrical circuits permitting joint operation were put in place. The trade booster enabled the slot machine to be operated by remote control and thus eliminated the necessity of coin activation. One of the control units was placed either next to or inside of the slot machine; the other unit was placed within reach of the custodian. One who wished to play the machine paid

the custodian for the number of games he desired. The custodian pressed a "credit" button on the control unit which registered the number of games purchased and the game was then played as it was before the conversion. Games won were merely registered on the machine, as the pay off mechanism had been removed. The games won could be cashed in, the player receiving his pay off from the custodian. A cancel push button removed the games that were cashed in from an indicator on the front of the machine and registered them on the control unit inside the slot machine. After it was altered to operate with the trade booster, the slot machine was inoperable without the trade booster.

The Johnson Act defines gambling device as follows:

> "§1171. Definitions
>
> "As used in this chapter—
>
> "(a) The term 'gambling device' means—
>
> "(1) any so-called 'slot machine' or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> • • •
>
> "(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device." 15 U.S.C.A. §1171.

Defendants contend that a trade booster transforms a slot machine into a nongambling device for amusement only.[4] They argue that after the slot machine has been

Footnote [4]

This point was lost in the trial court and and it only detracts from our main argu-

ment and creates confusion to treat it as a main contention in the Court of Appeals. For the purpose of this petition Your Honors may just disregard the point.

altered in such a way that its slot is so obstructed as to prevent the insertion of a coin to activate it, and its pay off mechanism has been removed, it is no longer a slot machine;[5] and, therefore, a trade booster is not a subassem-

Footnote [5]

Judge Campbell disposed of this contention as follows, p. 457

> "I hold, therefore, that a slot machine continues to be such after it has been deslotted and connected with a Trade Booster."

It will help in the understanding of our points here if Your Honors will, for the sake of argument accept the conclusion of Judge Campbell who said, p. 457

> "The label or name by which that object is known succeeds, by common usage, to mean that which it is in objective reality."

bly or essential part of a slot machine.[6] The difficulty with

Footnote [6]

This unfortunately is a distortion of our argument. Your Honors will understand our argument if these matters be kept separate. The defendants endeavored to convince the trial court that the slot machine was no longer a slot machine. In this the defendants failed. The main point, as urged upon the Court of Appeals is separate and does not fall merely because the defendants lost the first point.

this argument is that it dwells on nonessentials and completely ignores the fact that after the trade booster is attached, the machine performs precisely the same function as an unconverted slot machine, *i.e.*, it is a machine or device "an essential part of which is a drum or reel with insignia thereon * * * by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property * * *." Section 1171 does not require that a slot machine be a coin activated device nor that winnings be delivered automatically. The statute is clear on these points for "gambling device" is defined as "any so-called 'slot machine' *or any other machine or mechanical device* * * * by the operation of which a person *may become entitled* * * *." A slot machine is not a gambling device merely because it has coin slots or an automatic pay off mechanism. It is a gambling device because its function and design are to allow one to stake money or any other thing of value upon the uncertain event of achieving the winning combination of insignia.[7]

Footnote [7]

> Here Judge Swaim inadvertently forgets that the slot machine was not in interstate commerce. The federal government should not be concerned in whether the outfit was a slot machine or not. The question lost sight of here is—did Congress intend to include this gadget in 1171(3)?

Essentially the game is played as it was before the alteration or modification; and we cannot believe that a player would classify the machine differently after the conversion. Defendants' advertising literature recognized this fact when it stated:

> "Convert your game and STOP being fouled up with laws on gambling devices the complete game [slot machine and trade booster] have been thoroughly location tested and the playing public love it *and play it like they used to play a standard bell machine.*" (Emphasis added.)

Defendants have attempted to accomplish, or rather, permit others, *i.e.*, owners of slot machines, to accomplish, by indirection that which they cannot accomplish directly.

The Johnson Act clearly encompasses a slot machine equipped with a trade booster. *United States* v. *Three (3) Trade Boosters*, M.D. Pa. 135 F. Supp. 24.[8]

Footnote [8]

> Here is the crux of the case now presented to Your Honors. If a slot machine, equipped with a Trade Booster, had been shipped in interstate commerce the conclusion made by Judge Swaim here would apply. Judge Watson said, p. 28, in the case cited:
>
> > "We are here concerned with the Trade Boosters in their role as subassemblies or essential parts of slot machines, designed and manufactured *with the intent that they be used in connection with slot machines.*" (Emphasis added)
>
> Your Honors will perceive the difference between the question answered by Judge Swaim and that put by Judge Watson. We respectfully submit that Judge Kennedy answered the question properly in *United States* v. *McManus*, 138 F. Supp. 164, 166 as follows:
>
> > "The Court apologizes for this crude description and lack of ability to adequately describe a device of the character here involved, but from the foregoing it is apparent that while the device may be capable of use for gambling purposes, like the ordinary deck of cards can be so used, yet in itself is not a gambling device which,

> under the statute, will reward a player as the result of the application of an element of chance with any 'money or property'."

The slot machines to which the trade boosters were attached are not involved in this cause except to the extent necessary to determine whether the trade booster is a "subassembly or essential part intended to be used in connection with any such machine or mechanical device." 15 U.S.C.A. §1171 (a)(3). Therefore, the fact that the slot machines were not shown to have been in interstate commerce is of no significance.[9]

Footnote [9]

> Here we respectfully differ with Judge Swaim and ask Your Honors to decide this important question. We claim that the fact that the slot machines were not in interstate commerce puts an end to this case.

We therefore turn to the question of whether the trade booster is a subassembly or essential part of a so-called slot machine. Defendants argue in the negative on the grounds that the trade booster must be a subassembly or essential part in the original design of the slot machine without conversion; that the purpose of subsection (a)(3) was to prohibit evasion by shipment of a slot machine in separate packages;[10] and that the trade booster

Footnote [10]

> This is correct.

may be used in conjunction with nongambling devices.[11]

Footnote [11]

> This defense was made at the trial and ruled out by Judge Campbell. It has lost its importance.

It is, of course, true that a trade booster is not a subassembly or essential part of a slot machine as the latter was initially designed and manufactured.[12] But the trade

Footnote [12]

We might add for emphasis that the gadget had not been invented and Congress did not anticipate it.

booster performs precisely the same function as the coin slots and pay off mechanism previously performed in an unaltered slot machine. Therefore, to the extent that the coin slots and pay off mechanism were subassemblies or essential parts of an unaltered machine, the trade booster is equally a subassembly or essential part in the machine's altered or deslotted condition because the altered slot machine cannot be operated without the trade booster.[13] The

Footnote [13]

This argument overlooks the fact that the slot machine was not in interstate commerce. The trade booster helped the owner of a slot machine to operate on location after the owner had altered the machine. We must always return to the matter of construction of the Johnson Act. What did Congress mean by subassembly?

logic of defendants' argument would also exclude from the coverage of the Act replacement parts for a slot machine which had not been altered, a result which clearly was not within the legislative intention.[14] Defendants' contention

Footnote [14]

We have no intention of covering replacement parts and our argument has nothing to do with replacement parts.

that the purpose of subsection (a)(3) was to prohibit evasion by piecemeal shipment of a gambling device is in

part correct, but the language employed by Congress is not so limited, and the construction urged by defendants would thwart in large part the intent of Congress in the enactment thereof. Subsection (a)(3) is directed at evasion in general, not one particular means.[15]

Footnote [15]

We answer by requesting Your Honors to construe the subsection to mean what it says. Also Your Honors will keep in mind that said by Mr. Justice Jackson in *United States* v. *Five Gambling Devices*, 346 U.S. 441, 449 concerning the literal language of the Act.

Defendants also argue that a trade booster is not a subassembly or assential part of a slot machine because it may be employed with any type of device, gambling or nongambling, that may be used to record a score or any device through which electrical impulses may be registered.[16] If this be true it furnishes no defense because the

Footnote [16]

As we have said, this is no longer of importance. This point was lost below and not included here.

trade boosters here in question were *shipped* to be used and were used in connection with so-called slot machines.[17]

Footnote [17]

Here Judge Swaim reads something into the Act not to be found there.

Section 1171 does not require that any subassembly or essential part be such only as to the gambling devices defined in subsections (a)(1) and (2).[18] The fact that the

Footnote [18]

> Here is another parting of the ways between Judge Swaim and us. We contend that (3) refers to (2) and there could be some question as to the inclusion of (1). Judge Campbell ruled that (3) refers to (1) and (2).

various parts of a slot machine may be employed in a nongambling appliance does not render such parts any less subassemblies or essential parts of a slot machine. It is sufficient for the purpose of Section 1171 that any subassembly or essential part is "intended to be used in connection with any such machine or mechanical device." Defendants' advertising literature and booklet of service instructions for the trade boosters clearly indicate that they were "intended to be used in connection with" so-called slot machines; and the defendant Ansani so explained their use to a government agent.[19]

Footnote [19]

> Here Judge Swaim inadvertently lost sight of the fact that the Trial Judge had acquitted all but Ansani of shipping as charged in Count I. We quote, p. 460
>
> > "I hold that the Government has failed to prove that these four defendants knowingly and wilfully shipped or caused gambling devices to be transported in interstate commerce."

Furthermore, the testimony of defendants' witness Schuyler, the designer of the trade booster, demonstrated that while the trade booster may be used in connection with nongambling appliances, *e.g.*, cash registers and juke boxes, such use of the trade boosters was rare. The witness was hard pressed to explain any reasonable purpose

that would be served by using the trade booster with these or any devices other than altered slot machines.[20]

Footnote [20]

As we have said this defense failed before Judge Campbell, but our main defense did not fall with it.

We conclude that the trade boosters in question were subassemblies or essential parts intended to be used in connection with so-called slot machines or mechanical devices as further defined in Section 1171, Title 15 U.S.C.A.[21]

Footnote [21]

We respectfully contend that the Court of Appeals has misconstrued the Act.

Defendants next urge that the registration provisions of Section 1173, 15 U.S.C.A., violate the Fifth Amendment because they compel a defendant to give evidence against himself which may be used in a criminal proceeding.

Section 1173 provides:

"Upon first engaging in business, and thereafter on or before the 1st day of July each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills

or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this chapter, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section or without filing monthly the required inventories and records of sales and deliveries."

Count II of the indictment, which charged that defendants unlawfully failed and refused to file with the Attorney General any inventory or record of sales and deliveries of gambling devices, was dismissed by the District Court on the ground that this requirement of Section 1173 was repugnant to the Fifth Amendment. *United States* v. *Ansani*, N.D. Ill., 138 F. Supp. 451.[22] The govern-

Footnote [22]

We respectfully submit that Judge Campbell was correct in this finding.

ment has not appealed this determination so the only question before us is whether that part of Section 1173 which requires registration by dealers upon first engaging in business is violative of the Fifth Amendment. This registration requirement is obviously prospective. It contemplates the filing of required information before the dealer commences business. Defendants are not compelled to confess to acts already committed, they are merely informed of the conditions upon which they may do busi-

ness in the future. They make their own decision as to whether or not they will ship in interstate commerce the proscribed devices.[23] Moreover, the Act does not prohibit

Footnote [23]

Here Judge Swaim has inadvertently applied a general principle fixed by Your Honors in *United States* v. *Kahriger*, 345 U.S. 22, 32, not applicable in the case at bar. Ansani had made the shipment. Judge Campbell held that the other defendants were not bound by the acts of Ansani. Yet Judge Swaim makes use of a past act of Ansani to bring the other defendants within the Act.

interstate shipments to places in any state or any subdivision thereof if the state has enacted a law providing for exemption from the Act. 15 U.S.C.A. §1172. Thus, there is no necessary violation of the Act even if shipments are made. Since the privilege against self-incrimination relates only to past acts, the privilege has no just application to the situation before us. *United States* v. *Kahriger*, 345 U.S. 22, 32; *Lewis* v. *United States*, 348 U.S. 419, 422. Furthermore, since defendants failed to register, the question arises whether they now can claim the privilege even assuming that the disclosure of criminal acts is required. See *United States* v. *Sullivan*, 274 U.S. 259, 263-264.[24]

Footnote [24]

There is no finding here by Judge Swaim. Petitioners have been punished for a failure on the part of Ansani to register as a dealer. Petitioners claim that they are not dealers. Surely petitioners are in a position to question the constitutionality of the Act. Applied to their case by Judge Campbell and Judge Swaim the Act required petitioners to admit they were dealers in the absence of knowledge of the conduct of Ansani.

Defendants also contend that since the mandate of Section 1173 is not expressly confined to dealers in gambling devices in interstate commerce, it is constitutionally defective. District court decisions have held as a matter of statutory construction that the Act does not reach purely intrastate matters, *United States* v. *Denmark*, S.D. Ga., 119 F. Supp. 647; *United States* v. *Braun*, S.D. Ga. 119 F. Supp. 646; *United States* v. *Five Gambling Devices*, N.D. Ga., 119 F. Supp. 641; *United States* v. *15 Mills Blue Bell Gambling Machines*, M.D. Ga., 119 F. Supp. 74; *United States* v. *178 Gambling Devices*, S.D. Ill. 107 F. Supp. 394, and the Supreme Court has stated that it cannot say such an interpretation is not permissible. *United States* v. *Five Gambling Devices*, 346 U.S. 441, 450. In any event, defendants cannot raise the constitutional issue.[25] Since de-

Footnote [25]

We do not claim in this petition for certiorari that the mandate is unconstitutional for the reason here stated. This point was lost below.

fendants were, in fact, interstate dealers in gambling devices,[26] their constitutional rights have not been violated for

Footnote [26]

We respectfully challenge this.

we do not understand defendants to challenge the power of Congress to prohibit or regulate the interstate movement of gambling devices and to require registration for the purpose of making such prohibition or regulation effective.[27]

Footnote [27]

It is true that we have not challenged the power of Congress if the Johnson Act be properly construed. On the other hand we submit that the Courts below have enlarged the Act by interpretation and have given to Congress power not claimed by it and beyond its constitutional limits.

It is a fundamental rule of constitutional law that an act of Congress will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the Constitution forbids. If the application of Section 1173 to another fact situation presents a constitutional question, we must wait until the situation is properly before this court. And it does not appear, nor do defendants so argue, that if the statute is invalid as against an intrastate dealer it is also invalid as against an interstate dealer. Nor is it necessary to the decision of this case that this court decide as a matter of statutory construction that Section 1173 does not reach purely intrastate matters.[28] Whatever the ultimate construction of the

Footnote [28]

There can be no dispute as to this fundamental rule.

statute may be, defendants are clearly within its mandate.[29]

Footnote [29]

This, we respectfully challenge.

Defendants insist that the trial court erred in denying their motions for a bill of particulars.[30] The motions enu-

Footnote [30]

This claimed error is not included here in our petition for certiorari.

merated various requests for particulars under the respective counts of the indictment. The object of a bill of particulars is to furnish the defendant the particular facts or information concerning the charge against him to enable him to prepare his defense. *United States* v. *Glasser*, 7 Cir., 116 F. 2d 690, 702, modified on other grounds 315 U.S. 60. The trial court"s action on the application is discretionary and should not be disturbed in the absence of abuse of discretion. *Wong Tai* v. *United States*, 273 U.S. 77, 82. It is apparent from the record

that the trial court did not abuse its discretion in denying the respective motions. In addition, the motions were properly denied because defendants attempted to secure legal theory, not facts, *Kempe* v. *United States*, 8 Cir., 151 F. 2d 680, 685, such facts and information as were sought were within the knowledge of defendants, *Zito* v. *United States*, 7 Cir., 64 F. 2d 772, 773, or the defendants were in possession of the means of ascertaining the facts requested, *United States* v. *Skidmore*, 7 Cir., 123 F. 2d 604, 607.

Defendants claim that there was a variance between the place alleged and proved for the commission of the offense.[31] The indictment alleged Chicago, Illinois, and the

Footnote [31]

Nor is this now included.

government proved Cicero, Illinois. Both places were in the same venue as alleged and within the jurisdiction of the court. No claim of surprise or deception is made. Therefore, the variance was immaterial. *Ledbetter* v. *United States*, 170 U.S. 606, 613-614; *Cagnina* v. *United States*, 5 Cir., 223 F. 2d 149. And, if necessary, the record will afford defendants protection against a subsequent prosecution for the same cause. *Norris* v. *United States*, 5 Cir., 152 F. 2d 808, 811, cert. denied 328 U.S. 850.

Defendants attack the indictment on the ground that Count III, charging violation of the registration requirement of Section 1173, fails to allege that defendants were interstate dealers in gambling devices. An indictment is sufficient that charges a statutory crime substantially in the language of the statute. *United States* v. *O'Toole*, D. R. I., 101 F. Supp. 123, 127. The charge of the indictment in the instant case follows substantially the wording of the statute, which embodies all the elements of the crime and such charge clearly informed the defendants of that with which they were accused, so as to enable them to prepare their defense and to plead the judgment in bar of any subsequent prosecution for the same cause. Under these circumstances defendants' contention must fail.

Jelke v. *United States*, 7 Cir., 255 Fed. 264; *cf. United States* v. *Nickerson*, 7 Cir., 211 F. 2d 909.[32]

Footnote [32]

We do not question the sufficiency of the indictment as to form here in our petition for certiorari.

Defendants continue, insisting that Count III is duplicitous in charging both a failure by defendants to register with the Attorney General *or* the United States Attorney for the Northern District of Illinois. This objection is raised for the first time in this court.[33] An objection of inconsistency, duplicity or repugnancy comes too late when raised for the first time on appeal. *Harris* v. *United States*, 10 Cir., 190 F. 2d 503, 505. Furthermore, defendants advance only a technical claim based on the use of the disjunctive "or." The indictment did not charge defendants in the alternative with having committed one or another of several offenses. Only one offense was charged of which defendants were well aware. See *Johnson* v. *United States*, 5 Cir., 207 F. 2d 314, 319-320, cert. denied 348 U.S. 938.[34]

Footnote [33]

The record shows the numerous objections to the form of the indictment. No doubt Your Honors will accept as final the finding made by Judge Swaim that this objection to the form of the indictment was made for the first time in the Court of Appeals. We respectfully submit however that the point was amply preserved as an objection to the constitutionality of the Johnson Act.

Footnote [34]

As ve have said, the sufficiency of the indictment as to form is not before Your Honors.

Defendants insist that Count III of the indictment is void because venue is fixed at Chicago, Illinois, in the Northern District of Illinois, whereas Section 1173 directs that the registration of dealers in gambling devices must be made with the Attorney General.[35] It is correct that

Footnote [35]

> We respectfully request review here of this point—not merely as an objection to the indictment or a venue question. The answer of the Government was summed up by Mr. Justice Jackson in *United States* v. *Gambling Devices*, 346 U.S. 441, 445 as follows:
>
> "• • • Congress by oversight, left an inappropriate and confusing phrase in the Act, the defect is not fatal in as much as the Attorney General has to supplement the Act by regulations which will cure its indefiniteness."
>
> Judge Swaim appears to have followed the dissent by Mr. Justice Clark. Mr. Justice Black said, concurring, p. 452
>
> "Nor can a criminal statute too vague to be constitutionally valid be saved by additions made to it by the Attorney General."

Section 1173 designates the Attorney General as the registrar under the Act and that the office of the Attorney General, as head of the Department of Justice, is located in the District of Columbia. However, the Attorney General, pursuant to R. S. §161, 5 U.S.C.A. §22, promulgated a regulation providing that registration in the Northern District of Illinois shall be made "with the attorney general at the office of the United States Attorney, 219 South Clark Street, Chicago, Illinois • • •." Dept. of Justice Order No. 4173, 28 C.F.R. 1952 Supp., §3. Under Section

22, the Attorney General, as head of the Department of Justice, "is authorized to prescribe regulations, not inconsistent with law, for the government of his department, * * * the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." A regulation by a department of the government addressed to and adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law, unless in conflict with express statutory provision. *Rosen* v. *United States,* 245 U.S. 467. The regulation in question merely implements the Act in accordance with the authority granted by Section 22. *Cf. United States* v. *Morehead,* 243 U.S. 607. There is no inconsistency between the regulation and the designation of the Attorney General as the registrar under the Act. The United States Attorneys are representatives or officers of the Department of Justice and the Attorney General. *Sullivan* v. *United States,* 348 U.S. 170, 173-174; Reorganization Plan No. 2 of 1950, §1, 64 Stat. 1261, 5 U.S.C.A. Supp. P. 128 *et seq.* It would appear that even before the regulation that the required information sent to the Attorney General through a local United States Attorney would have amounted to compliance. In any event, our conclusion herein is supported by Section 2 of Reorganiaztion Plan No. 2 of 1950, which provides:

> "Sec. 2. The Attorney General may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Justice of any function transferred to the Attorney General, including any function transferred to the Attorney General by the provisions of this reorganization plan." 64 Stat. 1261.

The court is of the opinion that the Attorney General in the exercise of granted powers lawfully designated the United States Attorney for the Northern District of Illinois at his representative for registration purposes in

that district. Therefore, this action was properly filed in the Northern District of Illinois.[36]

Footnote [36]

Mr. Justice Black has indicated to the contrary in *United States* v. *Gambling Devices*, 346 U.S. 441, 452.

All of the defendants' other points have received full consideration and have been found to be without merit.

The judgment of the District Court is

AFFIRMED.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulation involved	2
Statement	5
Argument	7
Conclusion	13

CITATIONS

Cases:	
Lewis v. *United States*, 348 U. S. 419	11
Rosen v. *United States*, 245 U. S. 467	12
United States v. *Denmark and Braun*, Nos. 40, 41, O. T. 1953	12
United States v. *Five Gambling Devices*, 346 U. S. 441	11
United States v. *Kahriger*, 345 U. S. 22	11
United States v. *Morehead*, 243 U. S. 607	12
United States v. *Three Trade Boosters*, 135 F. Supp. 24	8
United States v. *Zazove*, 334 U. S. 602	12
Statutes and Regulation:	
Johnson Act, approved January 2, 1951, 64 Stat. 1134:	
Section 8	11
15 U. S. C. 1171	2, 8, 9
15 U. S. C. 1172	3, 7
15 U. S. C. 1173	3, 5, 7, 10, 11, 12
Department of Justice Order No. 4173, 16 F. R. 3509, April 24, 1951, 28 C. F. R. 1955 Supp., 3.1	4, 12
R. S. § 161	12
5 U. S. C. 22	12
Miscellaneous:	
H. Rep. No. 2769, 81st Cong., 2d Sess	8, 9

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 813

HARVEY MILNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 172–182; Pet. App. 26–45) is reported at 240 F. 2d 216. Opinions of the District Court are reported at 138 F. Supp. 451 (motions to dismiss indictment) and at 138 F. Supp. 454 (decision on the merits).

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1957 (R. 183), and a petition for rehearing was denied on February 1, 1957 (R. 184). The petition for a writ of certiorari was filed on March 4, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether "trade boosters", intended for use in connection with deslotted standard "one-armed bandit" slot machines for performance of their essential functions, are gambling devices within 15 U. S. C. 1171 (a) (3).

2. Whether the evidence shows that petitioners are dealers in gambling devices in interstate commerce.

3. Whether the registration provisions of 15 U. S. C. 1173, under which petitioners were convicted, are unconstitutional as compelling self-incrimination in violation of the Fifth Amendment.

4. Whether 15 U. S. C. 1173 is unconstitutionally vague as to place of registration, where a supplementary regulation consistent with the statute specifies where dealers shall register.

STATUTES AND REGULATION INVOLVED

The Johnson Act, approved January 2, 1951, 64 Stat. 1134, 15 U. S. C. 1171, et seq., provides in pertinent part as follows:

15 U. S. C. 1171:

> As used in this chapter—
>
> (a) The term "gambling device" means—
>
> (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

* * * * * *

15 U. S. C. 1172:

It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided,* That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section. * * *

* * * * * *

15 U. S. C. 1173:

Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each

month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this chapter, every manufacturer or dealer shall mark and number each gambling device, so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without having registered as required by this section, or without filing monthly the required inventories and records of sales and deliveries.

Department of Justice Order No. 4173, 16 F. R. 3509, April 24, 1951, 28 C. F. R. 1955 Supp., 3.1, provides:

Registration and filing of reports by manufacturers of and dealers in gambling devices having places of business in Illinois. Manufacturers of and dealers in gambling devices having places of business in the State of Illinois shall (a) register as required by section 3 of the act of January 2, 1951, entitled "An Act to prohibit transportation of gambling devices in interstate and foreign commerce" (Public Law 906, 81st Congress) with the Attorney General at the office of the United States Attorney, 219 South Clark Street, Chicago, Illinois, and (b) file the monthly reports required by that section with the Attorney General at the same place.

STATEMENT

Petitioners and defendant Ansani having waived jury trial were convicted of failing and refusing to register as dealers in gambling devices in violation of 15 U. S. C. 1173 (*supra*, p. 3) under Count III of an indictment returned in the United States District Court for the Northern District of Illinois (R. 5, 18, 19, 146). Under Count I, only Ansani, who is not a petitioner, was convicted of shipping and causing to be shipped in interstate commerce four "trade boosters" as gambling devices in violation of 15 U. S. C. 1172 (*supra*, p. 3; R. 3–4, 146). Each defendant was given a sentence of imprisonment for one year and one day and fined $1,000 (R. 147–151). On appeal the Court of Appeals unanimously affirmed (R. 183).

Pertinent evidence adduced at the trial may be summarized as follows:

Ansani, the office manager, and the four petitioners were partners in Taylor & Company, dealers in gambling devices, at Chicago, Illinois (R. 29, 47, 48, 50–53, 67). The H. C. Evans Company sold its entire output of trade boosters to Taylor & Company (R. 41).

A "trade booster" is an electrically operated mechanism, the object of which is to change a machine from a coin operated to a non-coin operated device (R. 24, 110). When a standard "one-armed bandit" slot machine is altered by removal of the slot insert and pay-off slots, it will operate by remote control after electrical connection is made with a trade booster. The deslotted machine does not deliver money and is not operated by insertion of coins (R. 24, 99). The trade booster has two control boxes, one located either next to, or in the slot machine, and the second on the counter near its custodian, such as a bartender (R. 25). If a machine is designated as a ten cent machine, a customer states that he wants ten games and pays the bartender one dollar. The bartender presses a button indicating the ten games. The player continues to pull the handle on the slot machine until such time as the ten games are played. If the player has had a winner, he may either play the remaining free games or collect from the bartender whatever amount is designated on the machine. If the player collects, a button on the control box cancels the remaining plays, and after pressing a button located on the bar the register on the machine is turned to zero (R. 27, 28).

On or about February 25, 1954, Ansani shipped four trade boosters by railway express on a Taylor & Company invoice from Cicero, Illinois, to Frank

Zaydell, a dealer in amusement machines in Williamsport, Pennsylvania (R. 82, 83, 87, 144–145). The invoice (Gov. Ex. 11) had written on it: "The merchandise listed in this invoice has been produced in accordance with the Fair Labor Standards Act of 1938, as amended. We Ship Anywhere All Orders F. O. B. Chicago" (R. 87). Ansani admitted to an F. B. I. agent that he had shipped the trade boosters, and that they were labeled as electrical equipment (R. 21–23). Taylor & Company advertising in "The Billboard", a trade publication, held the partnership out to be a distributor or dealer in trade boosters (Gov. Ex. 2; R. 133, 138). The partnership advertising literature and booklet instructions also indicate that the trade boosters were "intended to be used in connection with" so-called slot machines (Pet. App. 30, 35).

Custodians of gambling device records for both the Attorney General at Washington, D. C., and the United States Attorney at Chicago, Illinois, had no record of registration as dealers in gambling devices under 15 U. S. C. 1173 (*supra*, p. 3) of the petitioners, Ansani, or Taylor & Company (R. 73, 74, 75). No evidence was introduced by petitioners to show a Pennsylvania statute or a Williamsport ordinance exempting the locality from the provisions of 15 U. S. C. 1172 (R. 60).

ARGUMENT

1. Petitioners contend (Pet. 10–16) that the Johnson Act (*suprt*, pp. 2–4) should be construed to prohibit

the shipment only of slot machines (as there defined), and that the trade boosters here involved are not within the purview of the Act. Under the specific terms of 15 U. S. C. 1171 (a) (3), however, the term "gambling device" includes "any subassembly or essential part intended to be used in connection with any such machine or mechanical device" [mentioned in 1171 (a) (1) and 1171 (a) (2) above].[1] The trade boosters here are intended for use by electrical connection with altered or deslotted slot machines to make them perform in the same manner as standard "one-armed bandit" slot machines except for the removal of the insert slots and the pay-off mechanisms.[2] As the court below correctly observes, "* * * to the extent that the coin slots and pay off mechanism were subassemblies or essential parts of an unaltered machine, the trade booster is equally a subassembly or essential part in the machine's altered or deslotted condition because the altered slot machine cannot be operated without the trade booster" (Pet. App. 33). The trade boosters are thus subassemblies and essential parts of slot machines in their altered form, and are gambling devices under the language of 15 U. S. C. 1171 (a) (3). *United States* v. *Three Trade Boosters,* 135 F. Supp. 24, 28 (M. D. Pa.).

As the statutory definition of 15 U. S. C. 1171 (a) (1) itself shows, Congress intended that deslotted, as

[1] In H. Rep. No. 2769, 81st Cong., 2d Sess., in speaking of what is now 15 U. S. C. 1171, this statement is made (p. 7): "Subassemblies or essential parts [under (3)] intended to be used in connection with the two aforementioned classes [(1) and (2)] are included in the definition of gambling device."

[2] Taylor & Company's advertising literature and booklet of service instructions (Pet. App. 30, 35) indicate this intention.

well as, standard slot machines, should be gambling devices under the Johnson Act. H. Rep. No. 2769, 81st Cong., 2d Sess., p. 7, states:

> Slot machines, as defined herein, come within the definition of a gambling device whether or not they are equipped mechanically to deliver any money or property. If they are not equipped to deliver money or property mechanically, the winnings, if any, indicated on the machine are usually paid over the counter by the owner of the premises on which such slot machines are operated, or his employees.[8]

It is immaterial that the trade boosters are not subassemblies or essential parts of the slot machines as the latter were originally designed. The broad statutory language does not require this. It discloses a clear purpose of Congress to proscribe any subassembly or essential part intended to be used in connection with a slot machine—irrespective of when it was initially designed or manufactured. Otherwise the purpose of the statute could easily be circumvented.

Petitioners are not aided by the fact that there is no showing of interstate shipment of any slot machines. The issue is not whether slot machines were so transported, but whether trade boosters are gambling devices within 15 U. S. C. 1171 (a) (3) so that when petitioners become dealers in these devices with-

[8] See also the suggestion by Director of the Budget Lawton (id., pp. 15–16): "* * * the term 'gambling device' should be defined broadly enough to enable a construction which includes not only slot machines providing a return to the operator based on the element of chance but also devices specifically designed or used for the same or similar purposes as slot machines."

out registering as such, they are subject to prosecution under 15 U. S. C. 1173 (*supra*, p. 3).

2. Petitioners contend that, since only Ansani was shown actually to have shipped trade boosters in interstate commerce, they could not properly have been found to be dealers in interstate commerce (Pet. 16–18).

There is other convincing evidence apart from partner Ansani's activities to show petitioners' dealership. This includes proof that petitioners were partners in Taylor & Company; that they filed income tax reports as partners; that H. C. Evans Company sold its entire output of trade boosters to Taylor & Company; that Taylor & Company advertising in a trade publication held the partnership out to be a distributor or dealer in trade boosters; that the partnership advertising literature indicated that the trade boosters were "intended to be used in connection with" so-called slot machines; and that the partnership invoice utilized stated that the merchandise was produced in accordance with the Fair Labor Standards Act of 1938, and that orders would be shipped anywhere F. O. B. Chicago (see the Statement, *supra*, pp. 6, 7). This evidence shows Taylor & Company's potential for shipping trade boosters in interstate commerce and constitutes, at the very least, a *prima facie* case showing petitioners' dealership. Since petitioners offered no evidence in contradiction of this *prima facie* case, the finding against them was fully warranted.

3. Under 15 U. S. C. 1173 (*supra*, p. 3), "Upon first engaging in business, and thereafter on or before the first day of July of each year, every * * * dealer in

gambling devices shall register * * *." This language is clearly prospective and does not cover past conduct. Petitioners are not compelled to confess to acts already committed, but are merely informed by the statute that it shall be unlawful for them to act as dealers in gambling devices "without having registered as required by this section". Cf. *United States* v. *Kahriger*, 345 U. S. 22, 32–33; *Lewis* v. *United States*, 348 U. S. 419, 421–423.

Petitioners assert that since the District Court held unconstitutional the part of 15 U. S. C. 1173 regarding the filing of reports (138 F. Supp. at 453–454), the provisions regarding registration are automatically unconstitutional also (Pet. 20). This overlooks the difference between prospective registration and reports of illegal shipments after they were made. Section 8 of the Johnson Act (Pet. App. 25) makes its provisions severable, so that invalidity of any provision shall not affect others which can be given effect without the invalid provision. Congress intended that the Attorney General should have access to registration records of dealers in gambling devices for purposes of surveillance, even if the other provisions regarding reports of sales and deliveries might be judicially declared invalid.

4. Finally, petitioners assert that 15 U. S. C. 1173 is unconstitutional since it is vague regarding the place where a dealer is required to register (Pet. 10, 21). The ambiguity in the statute regarding the phrase "in such district" is described in footnote 6 of Justice Jackson's opinion in *United States* v. *Five Gambling Devices*, 346 U. S. 441, 445. We respect-

fully refer the Court to the government's brief in *United States* v. *Denmark and Braun*, Nos. 40, 41, O. T. 1953, pp. 23–25, for the proposition that the statute is not void for vagueness. See also Justice Clark's dissent in *United States* v. *Five Gambling Devices*, 346 U. S. at 456–459.

The Attorney General, designated as registrar under 15 U. S. C. 1173, pursuant to R. S. § 161, 5 U. S. C. 22,[4] issued on April 24, 1951, Department of Justice Order No. 4173, 16 F. R. 3509, 28 C. F. R. 1955 Supp., 3.1 (*supra*, p. 4), providing that dealers in gambling devices with places of business in the State of Illinois shall register "with the Attorney General at the office of the United States Attorney, 219 South Clark Street, Chicago, Illinois * * *." This regulation, a necessary and appropriate supplement for carrying out the purpose of the statute and not inconsistent with it, has the force and effect of law. Cf. *United States* v. *Zazove*, 334 U. S. 602; *Rosen* v. *United States*, 245 U. S. 467, 472–473; *United States* v. *Morehead*, 243 U. S. 607, 613–614. Under the regulation petitioners are clearly informed that as dealers in gambling devices in the State of Illinois they are required to register as such in Chicago.

[4] 5 U. S. C. 22: "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1956

No. 813

HARVEY MILNER, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Defendant.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AFFIRMED IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing

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Petition for Rehearing

May It Please The Court:

Comes now the above named Harvey Milner, John Edward Moore, Joseph J. Aiuppa and Ray Johnson and present this petition for a rehearing in the above entitled cause and in support thereof respectfully show:

The Trial Court erred and the Court of Appeals committed like error in its construction of the Johnson Act to include the electronic gadget here involved.

This is the question submitted. The Government opposed our petition for certiorari and we did not reply. The Government Attorneys addressed themselves to many points not now involved, so here on petition for rehearing we respectfully suggest that our one point may have been lost in the shuffle.

Ansani was convicted but did not request a stay from the Trial Court or the Court of Appeals. So Ansani has done his time and did not join in this petition for certiorari. This puts a new complexion on our case. The evidence was against Ansani and improperly imputed to the other defendants. The Trial Judge recognized the rule, 138 F. Supp. 454, par. 11, p. 460 but failed to apply it fully. The point was raised but not mentioned in the Circuit Court opinion.

Another point, this was obviously a test case. Ansani apparently believed that he did not violate federal law. To give his partners a year in jail for his mistake in judgment amounts to cruel and unusual punishment. This Honorable Court should assume supervision and hold that the penalty is unnecessarily severe as to the partners.

It is respectfully urged that this petition for rehearing be granted and that the judgment be reversed.

Respectfully submitted,

WM. SCOTT STEWART
Counsel for petitioners.

Certificate of Counsel.

I, Wm. Scott Stewart, counsel for the above named petitioners do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay. Also in compliance with Rule 58 par. 2 it does state grounds confined to intervening circumstances and other substantial grounds are available to petitioner although not previously presented.

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Counsel for petitioners.